(21)

No. 96-1578

In The

Supreme Court of the United States

October Term, 1997

HON. THOMAS R. PHILLIPS, *et al.*,

Petitioners,

v.

WASHINGTON LEGAL FOUNDATION, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether interest earned on IOLTA accounts is a compensable property interest of the client for purposes of a Taking Clause analysis?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

Mountain States Legal Foundation respectfully submits this *amicus curiae* brief on behalf of itself and its members in support of Respondents, Washington Legal Foundation, *et al.* Pursuant to Supreme Court Rule 37.2, this *amicus curiae* brief is filed with written consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Mountain States Legal Foundation ("MSLF") is a non-profit, membership, public interest, legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberty, the right to own and use property, limited government, and the free enterprise system. MSLF's members include businesses and individuals throughout the country who own and use land, including members who are clients and have money in IOLTA accounts.

MSLF's interest in the outcome of this lawsuit is tied directly to its members' private property rights. MSLF believes that overturning the Court of Appeals for the

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[1] Copies of the consent letters were concurrently filed with the Clerk of Court. In compliance with Rule 37.6 of this Court, *amicus curiae* state that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amicus curiae's* members, made a monetary contribution to the preparation or submission of the brief.

Fifth Circuit would do violence to the decisions of this Court that recognize the constitutional vitality of private property rights.

OPINIONS BELOW, JURISDICTION, AND STATEMENT OF THE CASE

MSLF hereby adopts Respondents' description of the opinions below, statement of jurisdiction, and statement of the case.

SUMMARY OF ARGUMENT

Respondents (hereinafter, Summers) have a property interest in the earnings generated through the Texas Interest on Lawyer's Trust Account (IOLTA) program. Summers is the owner of the principal deposited in the IOLTA account. As the owner of the principal he is entitled to its earnings as the fruit of the fund's use. Texas may not appropriate Summers' interest until it exceeds a certain value. Practical problems concerning allocating portions of the interest to clients do not eliminate Summers' property rights in controlling the use of his principal and the interest therefrom.

ARGUMENT

I. INTEREST GENERATED THROUGH THE TEXAS IOLTA PROGRAM IS SUMMERS' PRIVATE PROPERTY AND CANNOT BE TAKEN WITHOUT PAYMENT OF JUST COMPENSATION.

Property is one of the "3 key words" in the Taking Clause. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 142 (1978). The definition of property developed in taking decisions involves a two-tiered analysis. *See Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978); *Bishop v. Wood*, 426 U.S. 341, 344 (1976); *Perry v. Sindermann*, 408 U.S. 593, 602 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1971). The first step is to determine whether an "underlying substantive interest is created by 'an independent source such as state law. . . . ' " *Id.* The second step is to determine whether that interest rises to the level of a 'legitimate claim of entitlement'. . . . " *Craft*, 436 U.S. at 9. The interest earned on IOLTA accounts meets both of these tests.

A. Income Is Client's Property Under Texas Law.

The constitutional "hallmark of property . . . is an individua! entitlement grounded in state law, which cannot be removed except 'for cause.' " *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982). State judicial and statutory law creates and defines property through "existing rules and understandings." *Roth*, 408 U.S. at 577. An analysis of Texas property law demonstrates that Summers unequivocally has a "legitimate claim of entitlement" in the income generated through his IOLTA account.

At this level, Petitioners, Texas Equal Access to Justice Foundation, and Petitioners' *Amici* (hereinafter, TEAJF) contend that clients cannot have a cognizable property interest in fund proceeds that, but for the IOLTA program, would never have been generated. TEAJF's argument that property does not exist currently, however, does not address the issue presented in this case. The Texas IOLTA program undoubtedly generates interest property that is allocated to TEAJF for the benefit of political organizations. Since interest property is created, the proper issue for this Court's determination is who owns that property? *See* Baker & Wood, *"Taking": A Constitutional Look At The State Bar Of Texas Proposal To Collect Interest On Attorney-Client Trust Accounts*, 14 Tex.Tech.L.Rev. 327, 357 (1983).

Therefore, the first fallacy in TEAJF's argument is that the Texas IOLTA program does not create the right to earn income, as TEAJF would urge; it merely takes income already earned and allocates that income to political organizations. *Id.* Once the interest is created, however, that interest belongs to the owner of the principal. The interest earned on IOLTA accounts, therefore, belongs to Summers, not to TEAJF. It remains undisputed that the IOLTA funds themselves are the property of clients such as Summers. *See Coudert v. United States*, 175 U.S. 178 (1899); *Branch v. United States*, 100 U.S. 673 (1880). And, in Texas the fund owner has a constitutional right to the income generated by that fund. *See Sellers v. Harris County*, 483 S.W.2d 242, 243 (Tex. 1972); *City of Austin v. Austin National Bank*, 503 S.W. 759, 761 (Tex. 1974). "[I]nterest, according to all the authorities, is an accretion to the principal fund earning it, and, unless

lawfully separated therefrom, becomes a part thereof." *Lawson v. Baker*, 220 S.W. 260, 272 (Tex.Civ.App. 1920).

Texas common law specifies that interest is a civil fruit. *United States v. Dresser Indus., Inc.*, 324 F.2d 56 (5th Cir. 1963); *Himely v. Rose*, 9 U.S. 31, 17 (1809). As a civil fruit, "interest follows principal," so that interest earned on a deposit of principal belongs to the owner of the principal. *Sellers*, 483 S.W.2d at 243. The very essence of property is the right to the income generated therefrom.[2]

Legislative enactments in Texas also recognize that interest is the property of the owner of the principal. Basic trust principles establish that the client is the beneficiary of the trust created by the attorney-trustee. *See, e.g.*, Tex.Prob.Code Ann. § 239 (West 1956) (income to be paid to owner of assets); *see also, Wignall v. Fletcher*, 303 N.Y. 435, 103 N.E.2d 728 (1952). In fact, the beneficiary has an automatic right to income earned without the need for any agreement to that affect. *Id.*

Texas law defines interest as "the compensation allowed by law for the use or forbearance or detention of money." Tex.Rev.Civ.Stat.Ann. art. 5069 § 1.01 (West 1987). Prior to the IOLTA program, Texas attorneys were not required to invest client trust funds to benefit clients. *See* Tex. Bar R. Art. X § 9 Rule 1.14 (1997). Texas attorneys deposited their clients' funds in commingled, non-interest-bearing trust accounts. Basic trust principles mandate that, if Texas law requires attorneys to invest client trust

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[2] "What makes the right to mine coal valuable is that it can be exercised with profit." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922).

funds, the interest generated belongs to the clients. Although attorneys might pass along to the client the administrative costs associated with maintaining a trust account, they would do so regardless of the existence of an IOLTA program. The only difference being that, if attorneys passed on these costs before implementation of IOLTA, clients could offset these costs with the interest they earned from the trust account. In some cases, the interest would be in excess of the costs, thereby bestowing a benefit upon the client. "It follows that although clients may have had no state-created right to earn interest in the first place, they did have 'existing rules and understandings' which entitled them to interest if any was in fact earned." Sinibaldi, *The Takings Issue in California's Legal Services Trust Account Program,* 12 Hastings Const.L.Q. 463, 489 (1985).

Furthermore, properly invested capital almost always produces income. *See In re Interest on Trust Accounts,* 402 So.2d 389, 399 (Fla. 1981) (Boyd, J., dissenting). Indeed, prior to the creation of IOLTA accounts, financial institutions received the benefit of the income from client accounts because the deposits did not earn interest. *See* Kreider, *Florida's IOLTA Program Does Not "Take" Client Property for Public Use,* 57 U.Cin.L.Rev. 369, 389 (1988). This inconsistency is ignored by TEAJF.

The second fallacy in TEAJF's argument is that it assumes that a client's inchoate rights to income is not property. *See* Palmer, *A Critique of Interest on Lawyer's Trust Accounts Programs,* 44 La.L.R. 999, 1009 (1984). Under the two-tiered standard, however, entirely incorporeal or inchoate interests have been recognized as "private property" subject to constitutional protection. *See,*

e.g., Goss v. Lopez, 419 U.S. 565 (1975) (suspension from school deprived students of property interest in education). The Texas Constitution also recognizes a client's inchoate right to income. *See, State v. Biggar,* 848 S.W.2d 291 (Tex.3rd App.Dist. 1993).

It is obvious, therefore, that the interest generated by IOLTA accounts is Summers' property because his money is held in those accounts.

1. A Mutual Understanding Exists Concerning Interest Earned On Summers' IOLTA Account.

TEAJF argues that allocating the interest generated through IOLTA accounts to the clients is impractical because the additional costs of sub-accounting each client's *pro rata* share dissipate the benefit. According to this theory, IOLTA requires financial institutions to pay interest on these accounts, whereas the institutions previously were able to use this money without paying interest. If the interest were given to the clients, rather than to TEAJF, then attorneys would incur additional fees and expenses associated with the administration and distribution of those funds. According to TEAJF, this result justifies allocating the earnings to political organizations.

TEAJF's theory, however, rests solely on practical, rather than legal, support. *See* Sinibaldi, *supra,* at 490. "It assumes that Summers will receive no benefit whatsoever from investing his nominal or short-term funds because it will cost him more than he will gain in interest." *Id.* at 491.

Personal computer programs are more than capable of assisting lawyers in distributing interest to its respective owner. "Indeed, some financial institutions now furnish such services to customers." Palmer, *supra*, at 1008 n.6[7].

While it may be impractical to require attorneys to endure added costs, this does not mean that Summers has no property interest in the income generated from his IOLTA account within the meaning of the Taking Clause.

At this level, TEAJF urges that as the program currently operates, Summers has only a unilateral expectation in the interest earned on his IOLTA account, and thus no mutual understanding exists to give rise to a property interest. Because of enhanced banking techniques and increased competition among banking institutions, however, Summers does have an expectation that he will receive interest earned from any short-term account, including an IOLTA account. *See In re Interest on Trust Accounts*, 402 So.2d at 399 (Boyd, J., dissenting); Kreider, *supra*, at 389-391.

Banking institutions easily could trim costs by realizing greater efficiency in managing IOLTA accounts. For instance, "institutions holding several IOLTA accounts could . . . lump[ ] the quarterly payment of interest on all the institution's IOLTA accounts into a single transfer, with itemized reporting as to the source and allocation of the earnings." *Id.* at 390.

> If banks can today profitably offer NOW accounts to individuals, with smaller than average balances, there is no reason to suppose that such accounts would be unprofitable or more

> costly in the IOLTA context, where the average balance will in all probability be larger than the balances in individual household's NOW accounts.

Id. at 391 n.127. Further, increased competition among banking institutions reduces the cost of managing IOLTA accounts. *Id.* at 391.

Because banks are forced to change their operating habits, becoming more efficient, in order to compete effectively, deregulation of the banking industry has altered greatly depositor expectations concerning interest on their short-term nominal deposits. *Id.*

In the future, increased competition and technological development will increase further Summers' expectations of return on his deposited IOLTA funds. *Id.* at 393. Because of the depositors' heightened expectations of return, institutions must invest in more advanced technology and software to manage these funds, resulting in the institution's capability of offering higher rates of return on all depositor's funds at lower cost. *Id.* Therefore, all investors of small amounts of money, including Summers, expect higher rates of return on their deposits. *Id.*

Contrary to this Court's decision in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), TEAJF's theory seemingly redefines property as an interest that must necessarily benefit its owner. *See* Sinibaldi, *supra*, at 492. A state may not, however, redefine property in order to "appropriat[e] [such fund] for the [state] the value of the use of the [principal] fund for the period in which it is held." *Webb's*, 449 U.S. at 164. The fact that the interest

may be small does not justify allocating the funds to benefit political organizations without Summers' consent. Sinibaldi, *supra*, at 492-493.

a. Variable Factors Cannot Determine A Property Interest.

Inherent in TEAJF's analysis is the notion that an individual's property interest depends upon variable factors such as tax laws, administrative fees, technological advances, or changing competition among banking institutions. TEAJF argues that because these factors, at present, do not lend to a profitable IOLTA program for clients, Summers does not have a property interest in the income generated from those funds. An individual's property interest, however, has never depended on variable factors. An individual's property interest arguably might be subject to existing limitations, such as contract hindrances or navigability of water. *See Perry v. Sinderman*, 408 U.S. 593, 601-02 (1971); *United States v. Cress*, 243 U.S. 316, 330 (1917). A pre-existing limitation that devalues property at the outset, however, is wholly distinguishable from a law or a technological change that, even though variable, would seemingly define a property interest depending on the status of such law or technological advance. According to the theory advanced by TEAJF, the client's property interest in IOLTA earnings would depend upon the severity of the tax laws or the status of competition among banks. This is erroneous.

1) Petitioners' Bank Analogy Is Untenable.

Arguing by analogy that banks use a depositor's money in a checking account on which interest is not paid is not an apt analogy. The relationship between bank and depositor is contractual, created by express written agreement. The funds deposited, in essence, cease to belong to the depositor, but, rather, belong to the bank, subject to the terms of the agreement. The bank is obligated, under the depository agreement, to pay interest. If the bank fails, the depositor loses his or her money and is no more than a creditor, unless insurance is in place, in which event the insurance will ensure the repayment of the money. This is inapposite from the situation presented here. Unlike the banking deposit, the IOLTA account is not controlled by agreement. The client has no say in where his funds are deposited, whether they earn interest, or who gets the interest.

Furthermore, it is contrary to the immutable concept of property that property's existence depends on the discretion of one person, the attorney with whom the money is deposited in trust. Whether Summers' account earns interest or not depends on the lawyer's determination of what is a "nominal amount" and what is a "short period of time." TEAJF would argue that this discretion is guided by the principle that it is nominal, or a short period of time, if the amount and the time together will not result in payment of interest in excess of the administrative costs associated with such a deposit. While a banker might be able to make such a determination, a busy solo practitioner is normally not so qualified, nor so

inclined. This determination also apparently hinges on whether the lawyer in question has a number of other clients making trust account deposits, so that it can be pooled and the costs of administration spread. It would seem that interest could be earned in all cases, under these circumstances. This is so because, generally, the account is required by the attorney for his or her financial protection. Accordingly, the administrative costs of accounting for interest to the clients earned on the account most often will not be passed on to the client. Thus, the only cost is the service fee, which is usually a very small amount. There are, then, few, if any, sums that could be deposited without earning net interest, and the underpinning of the arguments of TEAJF is washed away.

Accordingly, whether an object is property or not would depend on the extent of the practice of the lawyer. If he or she has many clients, interest will be earned as part of a pooled account. If he or she does not, then interest earned will belong to Texas. Surely, whether a client has property or not cannot depend upon such vagaries unassociated with the character of property in question.

B. This Court Has Determined That Even *De Minimus* Property Rises To The Level Of A Legitimate Claim Of Entitlement.

TEAJF further argues that the value of the property involved determines whether there is a cognizable property interest. TEAJF argues that the interest at issue here is so negligible as not to be cognizable property under

state law. TEAJF's argument is contrary to this Court's recent decisions.

This Court has established, as a basic tenet of land-use jurisprudence, that certain rights are fundamental to the concept of private property. Among those fundamental rights are the right to absolute and exclusive ownership and possession of property and the right to evidence such exclusive ownership and possession by excluding others from using one's property. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979). To the extent that government agencies, or persons acting under color of law, deprive a property owner of the right to exclude others, this Court has declared such acts to be a deprivation of those fundamental rights and a taking of a property interest under the Fifth and Fourteenth Amendments to the United States Constitution, irrespective of the extent of the occupation or the identity of the interloper. *Id*; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). This Court has further defined property as "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use, and dispose of it. . . . " *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). Of course, this Court's definition of "property" includes far more than just "physical thing[s]." This Court has recognized many non-tangible items as property as well. *United States v. Security Indus. Bank*, 459 U.S. 70 (1982) (lien); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) (contract rights); *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (disability benefits). "The [Fourteenth Amendment] is addressed to every sort of interest the citizen may possess," *General*

Motors Corp., 323 U.S. at 378, and includes personal property in the form of money interest. *See Webb's*, 449 U.S. 155 (1980).

Thus, this Court mandates that Summers has a right to use the IOLTA funds and to exclude others from such use. *See* Palmer, *supra*, at 1012. This Court has established further a right to control the use of one's property as a property right protected by the Constitution. *See Loretto*, 458 U.S. at 436; *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 82 (1980); *Kaiser*, 444 U.S. 164 (1979).

In *Pruneyard*, a shopping center owner evicted students for distributing pamphlets and soliciting petitions for a cause with which the shopping center disagreed. The students sued, claiming the owner violated their first amendment rights. The owner appealed to this Court, arguing that the right to exclude others from his property was a fundamental property right that the state could not deny him without due process nor take from him without just compensation. This Court held that the owner did have a property right. This Court held: "one of the essential sticks in the bundle of property rights is the right to exclude others." *Pruneyard*, 447 U.S. at 82 n.6. Therefore, Summers not only has a right to use the IOLTA funds and to exclude others from such use, but he also has a right to control TEAJF's use of those funds.

Contrary to TEAJF's contention, this Court's decision in *Pruneyard* supports the proposition that Summers has a property interest in the income generated from his IOLTA account. As the students in *Pruneyard* used the shopping center owner's property, TEAJF uses Summers' property. *See* Palmer, *supra*, at 1014. As the shopping center owner

had a property right to deny the students use of the shopping center, Summers has a property right to deny TEAJF the use of his funds. *Id.*

This Court's decision in *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980), firmly established this proposition. In *Webb's*, this Court specifically addressed whether a statute that took interest earned on a privately owned principal fund violated the Constitution. *Webb's* involved a Florida statute that provided that "[a]ll interest accruing from moneys deposited [in Florida court registries] shall be deemed income of the office of the clerk of the circuit court . . . " Fla. Stat. Ann. § 28.33 (West 1974). Eckerd's of College Park, Inc., agreed to purchase the assets of Webb's Fabulous Pharmacies but filed a complaint of interpleader when it appeared that Webb's debts exceeded its purchase price. Eckerd's paid the entire purchase price to the court registry. Webb's had no pre-existing, state-created right to interest because the only statute that permitted the fund to earn interest was the same statute that vested ownership of that interest in the court clerk.

The court clerk refused the receiver's request for the interest on that account. The Florida Supreme Court held that there was no Taking Clause violation and that the Florida county could keep the interest because the creditors had no property right, merely an expectation. This Court reversed, rejecting the notion that Webb's creditors had a mere "unilateral expectation" of property. *Id.* at 161. Since the principal was held "only for the ultimate benefit of Webb's creditors, not for the benefit of the court and not for the benefit of the county . . . ", the creditors had "a state-created property right to their

respective portions of the fund." *Id.* "The State's having mandated the accrual of interest [did] not mean the State or its designate [was] entitled to assume ownership of the interest." *Id.* at 162. This Court further held that "the earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property." *Id.* at 164. "In these passages [this Court] clearly rejected Florida's rationale that the statute takes only what it creates. *See* Sinibaldi, *supra*, at 485.

TEAJF's attempt to distinguish *Webb's* is misplaced. In *Webb's* this Court warned that a state cannot recharacterize the interpleader fund principal as public property while deposited in the court's registry so as to appropriate the interest thereon. *Webb's*, 449 U.S. at 164. Therefore, TEAJF cannot recharacterize Summers' IOLTA fund or interest while deposited with attorneys as public money thereby unlawfully appropriating such fund or interest for public use. *See Kreider, supra,* at 388.

This Court's holding in *Webb's* firmly establishes that Summers has a property interest in the income he has earned from his IOLTA account, an interest that is protected by the United States Constitution. First, Summers' IOLTA funds are private property, like the funds deposited into the court in *Webb's*. *See* Palmer, *supra*, at 1015. Second, Summers retains his ownership of the funds deposited with his attorney. *Id.* Third, Summers has a state-created right to the funds that is protected by Texas law. *Id.* Fourth, "the income earned on the [IOLTA account] is 'the fruit of the funds' use." *Id.* Therefore, Summers' inchoate right to the income is a property interest protected by the Fourteenth Amendment. *Id.*

The practical effect of TEAJF's contention that the Fourteenth Amendment does not protect *de minimis* amounts of property is that client's property will not be accorded Fourteenth Amendment protection until it reaches a certain economic level. This result does not comport with recent decisions by this Court.

The *de minimus* concept, urged by TEAJF, has no relevancy to relations between individual and government. *See United States v. Lamb*, 294 F.Supp. 419 (E.D.Tenn. 1968). In recent Taking Clause challenges, this Court has analyzed the nature of the property interest taken, rather than its economic value. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Furthermore, contrary to TEAJF's contention, the *Webb's* decision creates a rule that is independent of the amount or value of the interest at issue, holding that a property interest existed in the accrued income simply because "[t]he earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property." *Webb's*, 449 U.S. at 164.

In *Loretto*, defendants argued that cable television equipment on plaintiff's building was so small that it did not impair his constitutional interest. *Loretto*, 258 U.S. 438 n.16. This Court held that the size of the interest invaded was a matter of degree rather than of principle. *Id.* at 436-437. In so holding, this Court found that the value of the property involved does not affect the determination of whether a property interest exists. Also, this Court held that "constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied." *Id.* at 436.

This Court, in *Nollan v. California Coastal Commission*, 483 U.S. 825, 831-32 (1987), reaffirmed its rationale in *Loretto* by holding "our cases universally have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* at 831 (quoting *Loretto*, 458 U.S. at 434-35).

In fact, this Court recently held that an amount as little as $23.50 was worthy of Fourteenth Amendment protection. *See Parratt v. Taylor*, 451 U.S. 527 (1981). Most recently, this Court held that an analysis to determine whether the resale value of household goods was too low to merit protection under the Taking Clause contradicted state law property characterizations. *Security Industrial Bank*, 459 U.S. at 76.

"It therefore appears that [Summers'] traditional property right in using and controlling the uses of [his interest] cannot be denied because of its small economic value." Sinibaldi, *supra*, at 489.

II. *PER SE* TAKING.

In order for the IOLTA program to violate the Taking Clause, TEAJF must have "taken" Summers' property.

This Court has held that a physical invasion of an individual's property is a taking. *See Loretto*, 458 U.S. 419 (1982). In *Loretto*, this Court held that the government's permanent physical occupation of the owner's property was a *per se* taking. *Id.* at 432. In so holding, this Court found that a cable company had physically invaded property by using space for its cable boxes and wires. This

Court held that the physical invasion amounted to a permanent occupation and that the *per se* rule applied, even though the equipment occupied only a small amount of space. *Id.* at 425-426.

TEAJF urges that Summers has no property interest because he has no reasonable expectation of receiving interest from his IOLTA account. Summers' reasonable expectation, however, may only come into play after a property interest has already been found. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-1006 (1984). Even then, contrary to TEAJF's contention, the *per se* rule, outlined in *Loretto*, applies here. First, the physical invasion approach defines a compensable taking whenever government "occupies, uses or in some manner takes physical possession" of the private property. A "forced contribution" of income of the IOLTA account funds obviously passes this test. *See Webb's*, 449 U.S. at 163-165. Furthermore, the IOLTA program physically invades Summers' funds and his right to the interest because TEAJF takes possession of the property right to receive the interest. *See* Palmer, *supra*, at 1017. That interest is withheld from Summers. Texas allows TEAJF to take possession of that interest. That intangible property is solely possessed and controlled by TEAJF.[3] The substance of the IOLTA program is that TEAJF appropriates and uses, for its own purposes,

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[3] A physical invasion of incorporeal property occurs when the government possesses or destroys the incorporeal interest. See Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv.L.Rev. 1165, 1184, n.37 (1967).

interest from a private account. Such possession and control constitute a physical invasion, even if it affects only a small amount of money. *Id.*, *citing Loretto*, 458 U.S. at 440, 435-436; *Webb's*, 449 U.S. at 163.

Furthermore, the physical invasion amounts to a permanent occupation of Summers' right to the income because Texas not only possesses the income but ensures that Summers has no possibility of ever possessing it.[4] *Id.* at 1018. This type of deprivation is also a permanent occupation of Summers' interest. *Id.* Indeed, anytime the state takes income from funds deposited by a client, the state has made an unlawful taking. *Webb's*, 458 U.S. at 438 n.16. The fact that the amount taken is small does not mean it is "not of constitutional significance." *Id.*

This Court has never upheld a permanent physical occupation of private property, "no matter how minute, and no matter how weighty the public purpose behind it, without payment of just compensation." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Indeed, "[t]he Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40 (1960).

Where the *per se* theory results in a finding that a taking has occurred, courts cannot apply other theories.

[4] "[T]he permanent physical occupation of property forever denies the owner any power to control the use of property; he not only cannot exclude others, but can make no non-possessory use of the property." *Webb's*, 458 U.S. at 436.

See Loretto, 458 U.S. at 435. Since in this case there is a taking under the *per se* theory, other theories do not apply. *See* Palmer, *supra*, at 1020. To hold otherwise would produce the "danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.*; *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). Therefore, contrary to TEAJF's contention, Summers' reasonable expectations are irrelevant to this analysis.

CONCLUSION

MSLF strongly believes that, both to protect the rights of Respondents and to secure the fundamental rights of all property owners from unwarranted incursions by state and federal government, this Court must uphold the Fifth Circuit's conclusion that Summers has a property interest in the earnings on his IOLTA deposit.

Respectfully submitted,

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